Supreme Court, U.S.
FILED
OCT 20 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-180

IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

RYAN KREBS, M.D.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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REPLY BRIEF FOR PETITIONER

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In its Memorandum in Opposition, respondent does not quarrel with our understanding of the fundamental principles underlying the waiver of Sixth Amendment rights. Nor, indeed, does the respondent contest that the issues as we framed them in the petition are significant ones, meriting review by this Court. Instead, respondent suggests that the opinion below is in fact consistent with prior opinions of this Court and other courts of appeals. It accomplishes this task, however, only through a feat of redraftsmanship wholly at odds with the plain language and explicit findings of the court of appeals.

1. In our petition, we explained in detail that through its holding in this case, the court of appeals has fashioned a new species of general waiver of the right to counsel. For the first time, it permits a defendant to forfeit his Sixth Amendment rights without any understanding of the underlying facts and likely consequences of a potential conflict of interest so long as the defendant purports to waive any "conceivable" conflict, whether or not he is then aware of it.

Respondent argues that the court of appeals in fact found the waiver here to be knowing and intelligent. This assertion, while correct, simply misses the point. To be sure, the opinion below genuflects to this Court's holdings in *Brady v. United States*, 397 U.S. 742 (1969), and *Johnson v. Zerbst*, 304 U.S. 458 (1938), requiring that the waiver of constitutional rights be made with " 'sufficient awareness of the relevant circumstances and likely consequences.' " Pet. App. 11a, *quoting Brady v. United States*, 397 U.S. at 748; *see* Pet. App. 12a-14a. The critical question, however, is whether that standard requires any understanding of the facts in context, or can be satisfied simply by demonstrating that a defendant understands in the abstract that he has, but may waive, a right to counsel.

Here the court of appeals did not disagree that at the time the petitioner purported to waive his right to conflict-free counsel, neither he, the government, nor the court was aware that the government's principal witness would allege at trial that petitioner's counsel was an active member of the conspiracy for which petitioner was charged and a witness to alleged illegal activity by his client. Pet. App. 11a-13a. While at least three other courts of appeals have held that this sort of information—the factual circumstances underlying a potential conflict—as well as their likely consequences to a defendant's right to a fair trial are essential to a constitutionally

valid waiver,[1] the court of appeals here concluded otherwise. Conceding that petitioner was ignorant of the conflict that later arose, the court concluded: "Even if the affidavit signed by Krebs was based on Robinson's representation that Kassim had never admitted guilt in the instant case, Krebs expressly waived 'any conceivable—actual or potential—conflict.'" Pet. App. 12a.[2] The issue, according to the court, was not whether petitioner understood the specific facts or their consequences to his defense, but whether "he possessed sufficient intelligence to comprehend the import of a waiver of 'any conceivable conflict' . . . ." *Id.* at 13a. Answering this question affirmatively, the court found a "knowing and intelligent" waiver. Pet. App. 14a. Once cut adrift in this fashion from its factual moorings, however, the demanding *Zerbst* waiver standard affords no protection at all, and leaves a defendant entirely on his own to make critical decisions about fundamental rights.

Respondent's efforts to piece together a valid waiver from other fragments in the opinion are equally unavailing. Thus, respondent discusses at length the fact that the petitioner attended a pretrial hearing at which the government explained the pitfalls of multiple representation. Mem. in Opp. 6. The problem, of course, is that the conflict here arose not from multiple representation but from the fact that petitioner's counsel was a material witness to and an alleged participant in the very events for which his client was charged. These conflicts raised grave dangers, later realized at trial, that are wholly dif-

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[1] *United States v. White*, 706 F.2d 506, 508 (5th Cir. 1983); *United States v. Curcio*, 680 F.2d 881, 888 (2d Cir. 1982); *United States v. Dolan*, 570 F.2d 1177, 1181 (3d Cir. 1978).

[2] To the same effect is the repeated emphasis of the court of appeals on the fact that the district court warned petitioner at the conflicts hearing that "unforseen conflicts of interest may arise during trial." Pet. App. 12a, 13a. That admonition was significant only if, as the court of appeals found, petitioner could waive a conflict of interest of which he was wholly unaware.

ferent than those posed by an attorney representing two defendants at trial. *See* Petition at 19 n.17.

Similarly, respondent points to a remark by petitioner's counsel on the day before trial that the government's chief witness might make accusations against him as sufficient to establish a valid waiver by the petitioner of his right to counsel. Mem. in Opp. at 6-7.[3] As we pointed out in the petition, there is much that is troubling about finding a waiver of the right to counsel from a defendant's failure to "repudiate" his own lawyer in open court, Pet. App. 14a. *See* Petition 21-22. At best, however, counsel's remark demonstrates that petitioner had some familiarity with the *facts* underlying the conflict. There is no evidence though that petitioner understood their *consequences* to his right to a fair trial. In virtually identical circumstances, where a defendant "was questioned extensively by the court regarding his awareness of the existence of a conflict" involving allegations of criminal activity by his counsel, the Court of Appeals for the Fifth Circuit refused to find a waiver for the very reason that the court failed to "inform[] the defendant of the precise manner in which he might be prejudiced by [his lawyer's] representation." *United States v .White*, 706 F.2d at 508.

In short, the only way respondent can sidestep reliance on petitioner's waiver of any "conceivable" conflict is to

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[3] In seeking to inflate counsel's cryptic remarks into a waiver, respondent grossly overstates them. According to the respondent, petitioner's counsel stated that "petitioner was aware that [the government's witness] might make serious criminal accusations against [counsel] and that petitioner was nonetheless willing to waive his Sixth Amendment rights and retain Robinson as counsel." Mem. in Opp. 7. The remarks, quoted in full at Pet. App. 12a, contain *no* reference to petitioner's Sixth Amendment rights or to his alleged wish to continue to retain his lawyer. Instead, they refer vaguely to petitioner's desire to "waive" "anything that Ms. [Kassim] wants to say about [counsel] on the stand," including the facetious suggestion that she will say that "I [counsel] murdered my father." *Ibid.*

point to a discussion of the consequences of a conflict wholly irrelevant to petitioner's circumstances and to a passing reference to the circumstances of the actual conflict totally divorced from their consequences. As we stressed in the petition, this Court has strongly suggested, and at least three courts of appeals have squarely held, that *both* elements—a full understanding of the relevant circumstances and the likely consequences of a conflict —are essential to a waiver of the right to conflict-free counsel. It is the willingness of the court of appeals to find a waiver without these elements, relying instead on a disavowal of any "conceivable" but unforseen conflicts, that sets the opinion below apart and merits review by this court.

2. Without disputing the existence of a Sixth Amendment duty not to conceal facts basic to a waiver decision, respondent suggests that the disclosure of Jencks Act material to all parties shortly before trial adequately fulfilled the government's explicit duty to report all known possible conflicts of interest. Mem. in Opp. 11; *see* Pet. App. 11a. This assertion, never raised by the government below, flies in the face of the findings of the court of appeals.

The court of appeals expressly found "several instances of prosecutorial misconduct in the trial of this action," Pet. App. 21a, specifically including the concealment by the government of facts about the conflict of interest, despite an express order of the district court to report all known possible conflicts of interest. Pet. App. 15a n.4, 18a-19a. At trial and on appeal, the government suggested merely that it did not report the fact that its chief witness would accuse petitioner's counsel of complicity in the conspiracy because "it did not take the allegations seriously." Pet. App. 18a. The court of appeals did not credit this feeble excuse, *id.* at 18a-19a, particularly implausible here since the Court found that the prosecutor had also improperly vouched for the credi-

bility and veracity of this same witness before the jury. *Id.* at 21a.

At most, the Jencks Act material suggested that another witness testified that petitioner's counsel had permitted the government's key witness to perjure herself in a separate trial of charges related to the conspiracy. Pet. App. 7a. The Jencks Act disclosures, however, gave no hint of the problems that lay at the heart of the conflict: that the government's key witness would herself allege that petitioner's counsel was actively involved in the drug dealing conspiracy and had, in fact, vouched for a potential drug purchaser jointly to her and to petitioner. *Id.* at 6a, 11a.

Respondent's assertion that the government satisfied its duty to report all conflicts of interest through the back door of a Jencks Act disclosure is particularly unappealing in the circumstances here. For when petitioner's counsel voiced to the court his general concern that he might be accused of wrongdoing, the government remained silent, even though it knew about the explicit and damning allegations its key witness had made about petitioner and his counsel and knew also that petitioner and the court were ignorant of them. Pet. App. 7a; 4 Tr. 57.

It can hardly be disputed that the government's concealment undermined not only the defendant's right to counsel, but also the trial court's ability to discharge its duty to inquire into conflicts of interest of which it becomes aware. The failure of the court of appeals to appreciate the significance of the prosecutorial misconduct that it found surely merits review.

CONCLUSION

For the reasons stated in the petition and in this reply brief, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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